

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 July 2004

BALCA Case Nos.: 2003-INA-95, 2003-INA-101

ETA Case Nos.: P2000-NV-09499813, P2000-NV-09499064

In the Matters of:

INTERSTATE PLUMBING AND AIR CONDITIONING, INC.,

Employer,

on behalf of

LUIS EMILIO MENDEZ-ESPEJEL,

ELIAS GUZMAN-RICCI,

Aliens.

Appearances: Annette Larsen, Executive Administrator
Las Vegas, Nevada
For the Employer and the Aliens

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from two applications for labor certification on behalf of Luis Emilio Mendez-Espejel and Elias Guzman-Ricci ("the Aliens") filed by Interstate Plumbing & Air Conditioning, Inc. ("the Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the applications, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and the

Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On June 29, 2000, the Employer filed applications for alien labor certification to enable the Aliens to fill the position of Air Conditioner Installer, which was classified by the Job Service as Heating and AC Installer. The job duties for the position included fabricating, running, and installing air conditioner system units, refrigeration and exhaust lines, duct work, and copper and PVC lines in residential and commercial buildings. The only job requirement for the position was two years of experience in the job offered. (AF 36).¹

In the report of recruitment results, dated March 19, 2001, Annette Larsen, Executive Administrator for the Employer, stated that they had "received five resumes in time for interviews on Saturday, March 10, 2001." Of the five applicants, two were interviewed for the position. Ms. Larsen reported that both applicants who had been interviewed were qualified for the job and were "being strongly considered for permanent hire." (AF 42-43).

On April 20, 2001, Ms. Larsen filed a supplemental report stating that both applicants had gone through a second interview, where they were told that "they would fit in the position of air conditioner installer" and possibly even foreman. The Employer stated that they "are scheduled to hire for these positions in May and/or June and the above individuals will be called in at that time." (AF 41).

¹ For purposes of this Decision, references to the AF will be to the Luis Emilio Mendez-Espejel file as representative of both the appeals.

In a Notice of Findings (“NOF”) issued on October 24, 2002, the CO proposed to deny certification on the grounds that the Employer had failed to show that a current job opportunity truly exists, which is clearly open to U.S. workers, as required in 20 C.F.R. § 656.20(c)(8). (AF 30-33). The CO questioned the Employer’s statement that they would not be hiring until May or June and questioned why a second interview had been conducted. The Employer was instructed to show that a current job opening existed. (AF 32).

On November 5, 2002, the Employer filed rebuttal to the NOF. (AF 5-29). The rebuttal contained various documentation establishing that the Employer has an ongoing business. (AF 7-29). However, with regard to the issue of whether a bona fide job opportunity truly existed, the Employer’s rebuttal consisted of a letter, dated November 5, 2002, signed by Ms. Larsen. (AF 5-6). Ms. Larsen noted that Applicant #1 was hired by the Employer in May 2001 and voluntarily left the Employer in August 2002. Applicant #2 stated during the second interview that he was seeking an office position.

On December 11, 2002, the CO issued a Final Determination (“FD”) denying certification on the above-stated grounds. (AF 3-4). The CO noted that in the recruitment report, the Employer stated that the applicants were well suited for the position at issue. However, in Rebuttal, the Employer indicated that the applicants were seeking the position of project manager. The CO found these statements to be inconsistent and determined that the Employer failed to satisfactorily rebut the NOF. (AF 4).

On January 16, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on February 19, 2003. The Employer submitted a statement of position on March 18, 2003.

DISCUSSION

Upon review, we find that the Employer's assertions on rebuttal are inconsistent with prior statements regarding the two qualified applicants and fail to establish the existence of a bona fide job opportunity for qualified U.S. workers.

The Employer acknowledged that the two U.S. applicants were qualified and applied for the position of Air Conditioning Installer. They each were interviewed twice by two different individuals. After completing the interview process, the Employer thought so highly of these two U.S. applicants that they "were both informed that they would fit in the position of air conditioning installer...(and)...would possibl(y) fit in a position of foreman." (AF 41). Nevertheless, there is no credible evidence that the Employer promptly offered either of the positions to the U.S. applicants, or that such positions were even available at that time. To the contrary, the Employer delayed any offer to these qualified U.S. applicants, noting that it is "scheduled to hire for these positions in May and/or June and the above individuals will be called at that time." (AF 41). Accordingly, we find that there were no job openings for the Air Conditioning Installer position or foreman positions until May 2001, notwithstanding the Employer's subsequent contrary statements on rebuttal. Furthermore, the Employer stated on rebuttal that it had hired Applicant #1 on May 14, 2001, while failing to specify for which position the applicant had been hired. (AF 5-6). As determined by the CO, we find that Employer failed to satisfactorily establish that a bona fide job opportunity has been and is clearly open to any qualified U.S. worker and labor certification was properly denied.²

² Furthermore, it should be noted that the Employer's actions in compelling admittedly qualified U.S. applicants to endure two interviews and then delaying the time for further contact and possible hire are actions which discourage the applicants. Such actions constitute an unlawful rejection of qualified U.S. applicants under 20 C.F.R. § 656.21(b)(6).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.